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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 133

MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC., UNITED AIRLINES, INC., VICKERS-ARMSTRONGS, INC., VICKERS-ARMSTRONGS (AIRCRAFT) LTD., Also known as VICKERS-ARMSTRONGS LTD., ROLLS-ROYCE, INC., and ROLLS-ROYCE, LTD.,

Respondents.

[Petitions Nos. 1, 3, 4, 5]

ERNEST RASSNER, As Assignee of MAURICE STEINGOLD, Executor of the Estate of SAMUEL A. STEINGOLD, deceased,

Petitioner,

—against—

The above-named respondents,

Respondents.

[Petition No. 2]

BRIEF FOR RESPONDENTS CAPITAL AIRLINES, INC., UNITED AIR LINES, INC., VICKERS-ARMSTRONGS INCORPORATED, and VICKERS-ARMSTRONGS (AIRCRAFT) LIMITED, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

WILLIAM J. JUNKERMAN,
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Opinions Below

Petition No. 1—The order of the Supreme Court of the State of New York, County of Kings, denying petitioner

Steingold's motion for an order joining his assignee as a party plaintiff was entered without opinion. The unanimous affirmance by the Appellate Division, Second Department, one justice concurring in the result with a separate memorandum, is reported in 19 AD 2d 752, 242 N.Y.S. 2d 1021, and the concurring opinion is also printed in Appendix C to the petition herein at page 17. The denial by the Appellate Division of petitioner's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 12. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1060, 246 N.Y.S. 2d 39. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.*

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* In an attempt to bring some degree of order to the chaotic state of the petitions herein, unnecessarily created by petitioners' treatment of separate orders and judgments in a single case as separate cases, the following table, relating the individual petitions to petitioners' motions in the Court of Appeals of the State of New York, the denials of which are sought to be reviewed, is respectfully submitted (See, 14 NY 2d 548, reprinted as Appendix A to this brief):

Motion	Petition No.
A(1)	1
A(2)	2
B	7
C	3
D	6
E	4
F	5

This answering brief is addressed to Petitions Nos. 1, 2, 3, 4, and 5.

Petition No. 2—The order of the Appellate Division denying petitioner Rassner's motion for leave to intervene is not officially reported, nor is the denial by that court of said petitioner's motion for leave to appeal to the Court of Appeals. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

Petition No. 3—The opinion of the Supreme Court of the State of New York, Kings County, granting judgment dismissing the complaint as to respondents Capital Airlines, Inc., and United Air Lines, Inc., is not officially reported but is printed in Appendix D to the petition herein at page 20. The affirmance of that dismissal by the Appellate Division, Second Department, is reported in 19 AD 2d 778, 242 N.Y.S. 2d 1022. The denial by the Appellate Division of petitioner Steingold's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 12. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

Petition No. 4—The opinion of the Supreme Court of the State of New York, Kings County, granting judgment dismissing the complaint as to respondent Vickers-Armstrongs Incorporated is not officially reported but is

printed in Appendix D to the petition herein at page 21. The affirmance of that dismissal by the Appellate Division, Second Department, is reported in 19 AD 2d 778, 242 N.Y.S. 2d 1018. The denial by the Appellate Division of petitioner Steingold's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 12. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

Petition No. 5—The opinion of the Supreme Court of the State of New York, Kings County, setting aside and vacating the service of the summons and dismissing the complaint as to respondent Vickers-Armstrongs (Aircraft) Limited is not officially reported but is printed in Appendix D to the petition herein at page 21. The affirmance of that order and the judgment entered thereon, by the Appellate Division, Second Department, is reported in 19 AD 2d 778, 242 N.Y.S. 2d 1020. The denial by the Appellate Division of petitioner Steingold's motion for leave to appeal to the Court of Appeals is not officially reported but a memorandum thereof was published in the New York Law Journal on September 25, 1963, at page 16. Petitioner's appeal to the Court of Appeals on alleged constitutional grounds was dismissed on November 27, 1963, 13 NY 2d 1062. The Court of Appeals' subsequent dismissal of petitioner's motion for leave to appeal, upon the ground that it was not made within the time required by statute, is reported in 14 NY 2d 548, 248 N.Y.S. 2d 647, and is also printed as Appendix A to this brief.

The Question Presented

The sole question presented by the various petitions is whether this Court should review orders of the Court of Appeals of the State of New York dismissing petitioners' motions for leave to appeal to that court on the ground that they were not made within the time required by a New York state statute after the Court of Appeals had heard oral argument and dismissed petitioners' previous appeals, allegedly taken as of right, upon the ground that no constitutional question was directly involved.

Statement

This action was instituted in the Supreme Court of the State of New York, County of Kings, by petitioner Maurice Steingold, a Virginia executor, to recover damages for the alleged wrongful death of Samuel A. Steingold, a Virginia resident, as a result of an airplane accident near Charles City, Virginia, on January 18, 1960. The flight involved originated in Chicago, Illinois, and was en route from Washington National Airport in Arlington, Virginia, to Norfolk, Virginia, at the time of the crash. Neither the flight nor the decedent had any contact with New York State. Before, and at the time of, commencing this action in New York State, petitioner Steingold had commenced and was actively prosecuting an action in the United States District Court for the Eastern District of Virginia against the same defendants as in the present action, based precisely upon the same facts as those in this action. (Pet., App. D., 18-19, 21.) That action is still pending and has not yet come to trial in the district court in Virginia.

Respondents Capital Airlines, Inc., and United Air Lines, Inc., are corporations doing business in the state of New York. Upon motion by said respondents, the complaint was dismissed as against them under the doctrine of *forum non conveniens* and upon the ground that the court had no jurisdiction of the subject matter of the action. (Pet., App. D., 20.)

Respondent Vickers-Armstrongs Incorporated is a Delaware corporation which had filed a certificate to do business in New York State. Upon motion by said respondent made after answer, the complaint was dismissed as to it in the exercise of the court's discretion under the doctrine of *forum non conveniens*. (Pet., App. D., 21-23.)

Prior to the dismissal of the complaint as against respondent Vickers-Armstrongs Incorporated, petitioner Steingold moved to add petitioner Ernest Rassner, as his assignee, as a party plaintiff in the action. Petitioner Ernest Rassner is an attorney associated with the firm of Rassner & Rassner, as is Jacob Rassner, counsel for petitioners herein. (Martindale-Hubbell Law Directory, 1964 ed., 2469.) Said motion was denied without opinion.

Respondent Vickers-Armstrongs (Aircraft) Limited* is a British corporation and service of the summons in this action was attempted to be made upon it by service upon the secretary-stenographer of one Christopher Clarkson, neither of whom was employed by or an agent of said respondent at that time. Upon motion by respondent Vickers-Armstrongs (Aircraft) Limited, service of the

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* Vickers-Armstrongs (Aircraft) Limited was never known as Vickers-Armstrongs, Ltd., as alleged in the summons and complaint; on the contrary, Vickers-Armstrongs Limited is and was an entirely separate and distinct British corporation.

summons was set aside and vacated and the action was dismissed as against it. (Pet., App. D., 21.)

Petitioner Steingold appealed to the New York Supreme Court, Appellate Division, Second Department, from the orders and judgments entered on the foregoing determinations of the lower court and the Appellate Division unanimously affirmed each such order and judgment. While said appeals were pending, petitioner Rassner, as purported assignee of petitioner Steingold, made a new motion in the Appellate Division for leave to intervene and be joined or substituted as party plaintiff in the action. This motion was also unanimously denied by the Appellate Division.

Petitioners then made separate motions in the Appellate Division for leave to appeal to the New York Court of Appeals from each of the aforesaid determinations by the Appellate Division and these motions were also denied. Thereafter, petitioners attempted to appeal as of right to the Court of Appeals, "on the ground that the construction of the Constitution of the United States is directly involved." Respondents then moved in the Court of Appeals to dismiss the said appeals and on November 27, 1963, all of the appeals were dismissed by the Court of Appeals "upon the ground there is no constitutional question directly involved," except in the case of the appeal from the affirmance of the order denying petitioner Steingold's motion to join his assignee as a party plaintiff, which appeal was dismissed "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution."

Thereafter, by notices of motion dated January 10, 1964, forty-four days after the dismissals of respondents' appeals "as of right" by the Court of Appeals, petitioner

Steingold moved that court for leave to appeal from the orders of affirmance of the Appellate Division and petitioner Rassner moved for leave to appeal from the order of the Appellate Division denying his motion in that court for leave to intervene. By orders dated February 20, 1964, the Court of Appeals dismissed each motion for leave to appeal, "upon the ground that it was not made within the time required by statute."

ARGUMENT

I

Under frequently repeated holdings of this Court, it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are allegedly in controversy than when the case turns entirely on questions of local or general law. *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960); *John* v. *Paullin*, 231 U.S. 583, 585 (1913); *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 214 U.S. 191, 195 (1909); *Newman* v. *Gates*, 204 U.S. 89, 95 (1907).

Here, petitioners' motions for leave to appeal to the New York Court of Appeals were dismissed "upon the ground that they were not made within the time required by statute." 14 NY 2d 550. Thus, the orders of dismissal, of which review is sought herein, were neither a deprivation of due process nor a denial of the equal protection of the law. Moreover, as petitioners, themselves, readily admit, the federal question allegedly involved "has not heretofore been raised, as the said dismissals were the last proceedings in the subject litigation." (Pet. 7.) As this Court has previously suggested, such a defect might

have been cured by a timely motion for a rehearing in the New York Court of Appeals, but petitioners failed to avail themselves of this procedure. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930).

In *Atlantic Coast Line R.R. Co.* v. *Mims*, 242 U.S. 532 (1917), this Court said (p. 535):

> "To become the basis of a proceeding in error from this court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'especially set up or claimed,' and must be denied by the state court. Rev. Stats., §709; Judicial Code §237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont Railway Co.* v. *White*, 238 U.S. 507; *John, Guardian,* v. *Paullin*, 231 U.S. 583; *Erie R.R. Co.* v. *Purdy*, 185 U.S. 148; *Layton* v. *Missouri*, 187 U.S. 356."

II

Petitioners not only seek to becloud the issues and rewrite the New York statutes, but also they flatly misstate respondents' contentions before the New York Court of Appeals. Under CPLR 5514 (a), if the appellants, petitioners here, err in the method of taking an appeal or of seeking permission to appeal, the date of dismissal or denial of permission becomes the starting point for com-

puting the thirty-day period specified in CPLR 5513 within which to pursue the proper path. Petitioners' remarks at page 7 of their petition to the contrary notwithstanding, CPLR 5514 (a) does not set the starting point as the date of service of a copy of the order dismissing the appeal erroneously taken as of right; rather it plainly and simply states that "the time limited for such other method shall be computed from the dismissal or denial * * *."

Moreover, petitioners' statement at page 8 of their brief, wherein they assert that respondents contended that the motions for leave to appeal before the Court of Appeals were not timely because not taken within thirty days after service of copies of the orders of the Appellate Division affirming the Supreme Court, is patently and demonstrably false and was neither the basis for the Court of Appeals dismissal of their motions nor the contention of respondents in the court below. In each brief filed in the Court of Appeals on behalf of the present respondents, the following statement was made*:

> "Appellant's appeal to this Court as of right was dismissed by the unanimous order of this Court entered November 27, 1963, and such order did not grant an extension of time within the language of Section 5514. Since a motion for permission to appeal must be made within thirty days of dismissal, the last day for making such a motion was December 27, 1963, and appellant's present motion is not timely."

That it was petitioners' failure to move within thirty days after the dismissal by the Court of Appeals of their

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* Motions A(1)(2)—Capital and United Brief, p. 4
Vickers Brief, p. 4
Motion C —Capital and United Brief, p. 5
Motion E —Vickers Brief, p. 6
Motion F —Vickers Brief, p. 6.

appeals taken as of right, rather than within thirty days after service of a copy of the orders of affirmance of the Appellate Division, as petitioners erroneously imply, is amply demonstrated in the memorandum of the Court of Appeals reported in 14 NY 2d 548, and printed as Appendix A to this brief.

Furthermore, it should be noted that, contrary to petitioners' statements at pages 6 and 7 of their petition, the provisions of CPLR 5514 (a), extending the time to pursue an alernative method of appeal or to seek permission to appeal, are neither new in the procedural law of New York nor were they enacted to eliminate any of the imaginary injustices or traps envisioned by petitioners. Prior to September 1, 1963, the effective date of the Civil Practice Law and Rules, L. 1962, ch. 308, the New York Civil Practice Act provided that an application for permission to appeal could be made following dismissal of appeals taken as of right; "by applying to the court of appeals within thirty days after entry of the order dimissing the appeal." CPA §592 (5) (b) (ii). Thus, the starting point for the thirty-day period within which to pursue an alternative method of appeal under the CPLR is precisely the same as it was under the CPA, and the New York Court of Appeals held almost ten years ago that a motion for leave to appeal served more than thirty days after the dismissal of an appeal taken on alleged constitutional grounds, was not timely made and must be dismissed. *City of New Rochelle* v. *Stevens*, 307 N.Y. 832, 128 N.Y.S. 2d 243 (1954).

It is noteworthy that petitioners do not assert that there was any delay in their receipt of notification of the Court of Appeals decisions of November 27, 1963. They hardly could do so since the clerk of that Court, pursuant to time honored practice, notified all parties to the litigation of the decisions, by telegram, as soon as they were handed down.

Finally, this Court has held that otherwise available rights may be waived if the rules set forth under state procedure are not followed. *Central Union Co.* v. *Edwardsville*, 269 U.S. 190 (1925); *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 214 U.S. 191 (1909). In effect, such failure to correctly exhaust available state procedure results in orders which are not "final judgments or decrees rendered by the highest court of a state in which a decision could be had", 28 U.S.C. §1257; cf. *Hammerstein* v. *Superior Court*, 341 U.S. 491 (1951). This Court's opinion in *John* v. *Paullin*, 231 U.S. 583 (1913), further clarifies this point (p. 585):

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., §709; Judicial Code, §237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

III

It will be noted that the petitions do not question the correctness of the basic decisions of the courts below. The reason, of course, is obvious, since the determinations of the New York courts were not only correct, but also were based upon independent non-federal grounds. Clearly, a state court has the right to exercise its discretion not to accept jurisdiction of foreign tort actions

involving non-residents. This is precisely the position taken by the New York courts with respect to respondents Capital Airlines, Inc., and United Air Lines, Inc., in petition No. 3, and respondent Vickers-Armstrongs Incorporated in petition No. 4, and is in accord with long established state law, *Williams* v. *Seaboard Air Line R.R. Co.*, 9 AD 2d 268, 193 N.Y.S. 2d 588 (1959); *Winters* v. *General Tire & Rubber Co.*, 13 AD 2d 470 (1961).

It is equally clear that a state may prescribe the basis for jurisdiction over foreign corporations and the method whereby service of process must be accomplished in order to commence an action in its own courts. Thus, the dismissal of the action as against respondent Vickers-Armstrongs (Aircraft) Limited in petition No. 5 was based upon non-federal grounds, to wit, improper service of the summons, and is also in accord with established state law. *Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 159 N.Y. Supp. 1145 (1917); *Simonson* v. *International Bank*, 16 AD 2d 55, 225 N.Y.S. 2d 392 (1962).

Further, the denial of petitioner Steingold's motion for an order joining his assignee as a party plaintiff in petition No. 1, and the denial of petitioner Rassner's motion for an order to intervene as assignee in petition No. 2, were both based upon the non-federal ground of non-assignability of the cause of action for wrongful death or right to sue and are fully in accord with the established law of both New York and Virginia. N. Y. Personal Property Law §41 (1); *Rice* v. *Postal-Telegraph-Cable Co.*, 174 App. Div. 39, 160 N.Y. Supp. 172 (1916); *City of Richmond* v. *Hanes*, 203 Va. 102, 122 S.E. 2d 895 (1961).

The New York Court of Appeals reviewed all five of these orders of the lower courts and dismissed petitioners' appeals taken "as of right" on the ground that the order sought to be appealed from did not finally determine the

action within the meaning of the constitution in petition No. 1, and that no constitutional questions were directly involved in petitions Nos. 2, 3, 4 and 5. 13 NY 2d 1060, 1062. It is therefore abundantly clear that the Court of Appeals found that the lower court orders were based upon independent non-federal grounds.

In *Murdock* v. *City of Memphis*, 87 U.S. 590, 634-36 (1874), this Court decided that it would not review state court decisions which rest on independent and adequate state grounds. The decisions reinforcing and applying this principle are legion, as well as recent. Cf. *Fay* v. *Noia*, 372 U.S. 391, 428-29 (1963); *Wilson* v. *Loew's Inc.*, 355 U.S. 597 (1958); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). This Court's opinion in *Lynch* v. *New York*, 293 U.S. 52 (1934), explained the application of the principle, as follows (pp. 54-55):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. • • • Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. • • •"

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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JAMES B. MCQUILLAN
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APPENDIX A

COURT OF APPEALS

STATE OF NEW YORK

MAURICE STEINGOLD, as Executor of SAMUEL A. STEINGOLD, Deceased,
Appellant,

v.

CAPITAL AIRLINES, INC., et al.,
Respondents.

Submitted January 20, 1964; decided February 20, 1964.

(A) MOTION for leave to appeal from (1) an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (MILES F. MCDONALD, *J.*), entered in Kings County, denying a motion by plaintiff for an order joining his assignee as a party plaintiff, and (2) an order of said Appellate Division, entered March 25, 1963, which denied a motion by plaintiff's assignee to intervene. (B) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*), entered in Kings County, setting aside and vacating the service of the summons upon defendant Rolls-Royce, Ltd. (C) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*), entered in Kings County, dismissing the complaint as to defendants Capital Airlines, Inc., and United Airlines, Inc. (D) MOTION for leave to appeal from an order of said Appellate Divi-

sion, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*; opinion 34 Misc 2d 33), entered in Kings County, quashing service of process and dismissing the complaint as to defendant Rolls-Royce, Inc. (E) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed a judgment of the Supreme Court, entered upon an order of the court at Special Term (JAMES S. BROWN, JR., *J.*), entered in Kings County, dismissing the complaint as to defendant Vickers-Armstrongs, Inc. (F) MOTION for leave to appeal from an order of said Appellate Division, entered July 8, 1963, which unanimously affirmed an order of the Supreme Court at Special Term (ANTHONY J. DI GIOVANNA, *J.*), entered in Kings County, setting aside and vacating the service of the summons and dismissing the complaint as to defendant Vickers-Armstrongs (Aircraft) Ltd. On November 27, 1963 the Court of Appeals dismissed appeals taken as of right from all of the foregoing orders of the Appellate Division which were entered on July 8, 1963 (see 13 N Y 2d 1060, 1062). The notices of all the foregoing motions, (A) through (F), were dated January 10, 1964.

Jacob Rassner for motions (A) through (F).

Edward J. Behrens and Charles H. Lawson opposed to motions (A) and (C).

William J. Junkerman, James B. McQuillan and Carroll E. Dubuc opposed to motions (A), (E) and (F).

John C. Lankenau opposed to motions (A), (B) and (D).

Motions (A) through (F) dismissed upon the ground that they were not made within the time required by statute. (Motions [A] and [C] dismissed, with $10 costs; motions [E] and [F] dismissed, with $10 costs and necessary printing disbursements.)